

KIMBERLY SUE COAL CO., INC.

IBLA 83-619  
IBSMA 82-19

Decided July 13, 1983

Appeal by Kimberly Sue Coal Company, Inc., from the March 12, 1982, decision of Administrative Law Judge Tom M. Allen, upholding OSM jurisdiction and thus sustaining the validity of Notice of Violation No. 81-I-25-17 and Cessation Order No. 81-I-25-5 (Docket No. CH 1-149-R).

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Variances and Exemptions:  
2-Acre

The area of an access and haul road used for more than one coal mine is properly attributed to each mine in calculating the extent of the surface area affected by each mine for the purpose of determining whether the mine qualifies for the 2-acre exemption of sec. 528(2) of the Act and 30 CFR 700.11(b).

Rhonda Coal Co., 4 IBSMA 124, 89 I.D. 460 (1982), and Virginia Fuels, Inc., 4 IBSMA 185, 89 I.D. 604 (1982), modified to the extent inconsistent.

APPEARANCES: Dennis E. Jones, Esq., Lebanon, Virginia, for Kimberly Sue Coal Company, Inc.; Harold Chambers, Esq., Office of the Field Solicitor, Charleston, West Virginia, John Pendergrass, Esq., Attorney, and Walton D. Morris, Jr., Esq., Assistant Solicitor for Litigation and Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Kimberly Sue Coal Company, Inc. (Kimberly Sue), has appealed from the March 12, 1982, decision of Administrative Law Judge Tom M. Allen, Docket No. CH 1-149-R, in which he held that the Office of Surface Mining Reclamation and Enforcement (OSM) had jurisdiction under the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328 (Supp. IV 1980) (the Act), and its implementing regulations, 30 CFR Chapter VII (the regulations), to issue Notice of Violation (NOV) No. 81-I-25-17, charging Kimberly Sue with five violations of the Act, and Cessation Order (CO) No. 81-I-25-5, issued for failure to abate the violations.

### Facts

On July 9, 1981, OSM inspector Carroll Blevins issued NOV No. 81-I-25-17 to Kimberly Sue, alleging five violations of the regulations at the company's abandoned mine No. 1 in Buchanan County, Virginia. Kimberly Sue applied for review, contending that it had disturbed less than 2 acres and was therefore exempt from the Act. 30 U.S.C. § 1278(2) (Supp. IV 1980); 30 CFR 700.11(b). Prior to the hearing, OSM revisited the site and, finding that the violations had not been corrected, issued CO No. 81-I-25-5.

Evidence presented at the hearing disclosed that the Kimberly Sue minesite consisted of 1.61 acres (III Tr. 13-14, OSM Exh. 9). Kimberly Sue sublet the minesite from the mineral lessee, Lloyd Stacy (II Tr. 43-44), who did business nearby as the High Point Coal Company (High Point), using the same haul road (II Tr. 59-60). During much of the period when Kimberly Sue operated, it was the only operator using the haul road (III Tr. 39-40), which was determined by survey to consist of 1.08 acres (I Tr. 5, OSM Exh. 1). Thus, OSM considered the area disturbed by Kimberly Sue to be 2.69 acres in total and concluded the minesite was subject to its jurisdiction (III Tr. 13-14), notwithstanding that the haul road had been deeded to the county in order to avoid such jurisdiction (II Tr. 36-37).

On cross-examination, Kimberly Sue established that the face-up of the High Point mine had been done during the period when Kimberly Sue was operating; that High Point must have used the same access road that Kimberly Sue used during that period; but that the High Point operation had been dormant between the time of the face-up and the time when Kimberly Sue ceased operating (III Tr. 37-39). OSM became aware of the Kimberly Sue site only in the context of a later inspection of the High Point site, when Inspector Blevins issued an NOV to High Point for violations similar to those of Kimberly Sue (III Tr. 25-26) and for its alleged failure to maintain the haul road (III Tr. 32-33). At the time the NOV was issued to Kimberly Sue, Blevins was aware that Stacy (High Point) was to have provided the engineering services for Kimberly Sue and that those services included responsibility for maintaining the haul road (III Tr. 32-35; II Tr. 65).

### Discussion

[1] The Administrative Law Judge held that since Kimberly Sue "did not deny that any of the five violations existed \* \* \* and that no remedial action was taken, therefore the only question presented was whether or not the applicant was subject to the Act by disturbing in excess of 2 acres. Since applicant produced no evidence to the contrary, the establishment that Kimberly Sue was the only one using the road at the time of the issuance of the notice of violation, the total acreage of the road, 1.08 acres \* \* \* when combined with the 1.61 acres disturbed by mining (OSM Exh. 9), clearly gives OSM jurisdiction over the mining activity of Kimberly Sue" (Decision at 1-2).

On appeal Kimberly Sue argues that OSM did not make a prima facie case because "the record reveals \* \* \* that the area of disturbance, the site operated by Kimberly Sue Coal Company was less than TWO (2) acres \* \* \*" (Appellant's Brief at 7). (Emphasis added.) However, unless an access or haul road is maintained with public funds, its area may be added to that of the mining site for purposes of determining whether a person is subject to the Act. Jewell Smokeless Coal Corp., 4 IBSMA 211, 89 I.D. 624 (1982). The

fact that the road is used by more than one operator has no bearing on the determination. See FR 33424, 33425, 33432 (Aug. 2, 1982). 1/ The road was not maintained with public funds (OSM Exh. 30, III Tr. 34-35). Thus, it was proper to combine the acreage of the road with that of the site and to conclude that Kimberly Sue was subject to OSM's jurisdiction.

Appellant also argues that because it was economically integrated with High Point Coal Company and because the latter was also cited for similar violations High Point is the proper responsible party (Notice of Appeal at 2; Appellant's Brief at 2-3). The facts do not support the argument. Although High Point constructed the road and subleased the coal that Kimberly Sue was mining, the two entities were distinct. The former was a sole proprietorship of Lloyd Stacy, the latter a partnership of Steven G. Deel and Vernon O'Quinn, and Kimberly Sue obtained its own Virginia license and Federal mine identification number (OSM Exhs. 4, 8, 28). Deel testified that Stacy "had no connection whatsoever with Kimberly Sue" (II Tr. 43). Neither person had any interest or office in the other's business (II Tr. 64-66). Kimberly Sue paid royalties to Stacy and fees for engineering services that he arranged. Under these circumstances Kimberly Sue cannot be relieved of responsibility for its violations. It was a person conducting surface coal mining operations on more than 2 acres, as discussed above, and therefore the obligations of the Act and regulations applied to it. 30 CFR 710.11. High Point was independently liable for its own violations.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, 2/ the decision of the Administrative Law Judge is affirmed.

Will A. Irwin  
Administrative Judge

We concur:

R. W. Mullen  
Administrative Judge

Edward W. Stuebing  
Administrative Judge

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1/ We recognize and intend a departure from the decisions of the Board of Surface Mining and Reclamation Appeals that attributed a jointly-used road only in part to each of the operations that used it. See Rhonda Coal Co., 4 IBSMA 124, 135, 89 I.D. 460, 466 (1982); Virginia Fuels, Inc., 4 IBSMA 185, 189-90, 89 I.D. 604, 606 (1982). Those decisions are thus modified to the extent inconsistent.

2/ By Secretarial Order No. 3092, dated Apr. 26, 1983, the Secretary transferred all functions and responsibilities delegated to the Board of Surface Mining and Reclamation Appeals to the Board of Land Appeals. 48 FR 22370 (May 18, 1983).